SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 75

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF WILLIAM B. BUTTERWORTH, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 Before the United States Board of Tax Appeals

Docket No. 44368

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH & GIRARD TRUST CO., Trustees Under the Will of Wm. B. Butterworth, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, respondent

Appearances: For petitioners—Charles Myers, Esq.; for respondent—M. E. McDowell, Esq., L. A. Luce, Esq.

Docket entries

May 11, 1929. Petition received and filed. Taxpayer notified. (Fee paid.)
May 13, 1929. Copy of petition served on General Counsel.
July 5, 1929. Answer filed by General Counsel.
July 9, 1929. Copy of answer served on taxpayer—assigned to General Calendar.
Aug. 26, 1930. Hearing set Nov. 11, 1930.
Sept. 9, 1930. Motion for leave to amend petition filed by taxpayer—amendment tendered.
2 Sept. 10, 1930. Motion granted.
Sept. 13, 1930. Copy of motion and amended petition served on General Counsel.
Nov. 11, 1930. Hearing had before C. R. Arundell, division 7, on merits. Case held open to Dec. 11, 1930, for submission of further evidence. Petitioner's brief due Dec. 12, 1930; respondent's due Jan. 12, 1931, and reply briefs due Jan. 25, 1931.
Dec. 1, 1930. Transcript of hearing of Nov. 11, 1930, filed.
Dec. 8, 1930. Motion for 30 day extension to file stipulation of correct deficiency filed by taxpayer.
Dec. 8, 1930. Motion granted.
Dec. 12, 1930. Brief filed by taxpayer.
Jan. 3, 1931. Stipulation as to deficiency filed.
Jan. 9, 1931. Brief filed by General Counsel.
Jan. 22, 1931. Reply brief filed by taxpayer—copy served on General Counsel.
June 23, 1931. Findings of fact and opinion rendered—C. R. Arundell, div. 7. Decision will be entered determining the deficiencies in the amounts stipulated.
June 29, 1931. Decision entered—C. R. Arundell, division 7.

Dec. 21, 1931. Petition for review by U.S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.
Dec. 21, 1931. Proof of service filed.
3 Feb. 9, 1932. Motion for 30-day extension to prepare and transmit record filed by taxpayer.
Feb. 9, 1932. Order enlarging time to Mar. 19, 1932, for preparation of evidence and delivery of record sur petition for review entered.
Feb. 25, 1932. Agreed statement of evidence lodged.
Feb. 29, 1932. Agreed statement of evidence approved and filed.
Mar. 5, 1932. Præcipe filed.
Mar. 16, 1932. Proof of service filed.
Mar. 17, 1932. Order enlarging time to April 15, 1932, for transmission and delivery of record sur petition for review entered.
4 Before the United States Board of Tax Appeals

[Title omitted.]

Petition

Filed May 11, 1929.

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: FHH-60D, dated March 13, 1929, and as a basis of their proceeding allege as follows:

(a) Your petitioners are the trustees under the will of William B. Butterworth, deceased, who died October 5, 1921, a resident of Philadelphia County, Pennsylvania, leaving a last will duly probated before the register of wills of said county, by the terms of which he appointed petitioners as trustees. Petitioners have received notice from the respondent that the determination of petitioners' tax liability under the Revenue Act of 1926 for the years 1924 and 1925 discloses a deficiency of $3,304.51, and this proceeding is brought to determine the petitioners' liability for said deficiency.

5 (b) The amount of the deficiency, the nature of the tax, and the years for which asserted, are set forth in the notice received by the petitioners from the respondent, a copy of which marked "Exhibit A" is hereto attached and hereby made a part hereof.

(c) Your petitioners allege that the respondent erred in determining that petitioners are subject to a further tax liability of $3,304.51 for the years 1924 and 1925.

(d) Under the will of the said William B. Butterworth, deceased, a copy of which marked "Exhibit B" is hereto attached and hereby made a part hereof, he gave to his widow, Julia Butterworth, the net income from his residuary estate for and during the full term of her natural life. Said widow elected to take under said will by

writing signed and acknowledged by her delivered to the executors of the decedent, and filed and recorded as required by section 23 of the act of Assembly of Pennsylvania of June 7, 1917, P.L. 403.

(e) Your petitioners aver that under the acts of assembly above referred to and section 3 of the act of assembly of said State, approved June 7, 1917, P.L. 429, the provision made for decedent's widow in his will, which she elected to take, was in lieu and full satisfaction of her dower interest at common law in his estate, and is not subject to the payment of Federal income tax by the widow or by the petitioners as trustees for her. Your petitioners are further advised and therefore aver that the amount paid to said widow during the years 1924 and 1925 by the petitioners, in compliance with the terms of the decedent's will, are wholly exempt from Federal income tax.

(f) Your petitioners aver that as trustees under the will of
6 said William B. Butterworth, deceased, they have filed income-tax returns as required by law for the years 1924 and 1925, and have paid the full amount of income tax due from them under the law for said years.

(g) Wherefore, your petitioners pray that this Board may hear the proceeding and determine that the additional tax liability assessed against the petitioners for the years 1924 and 1925 under the Revenue Act of 1926, as aforesaid, was erroneously assessed.

And your petitioners will ever pray, etc.

BARNES, [illegible]OLE & MYERS,
By CHARLES MYERS,
Counsel for Petitioners,
1421 Chestnut Street, Philadelphia, Pa.

[Duly sworn to by J. H. Lawson; jurat omitted in printing.]

7 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, March 13, 1929.

IT: FHH-60D.
Est. of WM B. BUTTERWORTH,
c/o Girard Trust Co., Phila., Pa.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924 and 1925 discloses a deficiency of $3,304.51, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C.,

for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. BLAIR, *Commissioner*,
By J. S. MACLAUGHLIN,
Collector of Internal Revenue.

8

STATEMENT

IT:FHH-60D

MARCH 13, 1929.

In re: Est. of WM. B. BUTTERWORTH,
c/o Girard Trust Co., Phila., Pa.

Year	Corrected tax liability	Tax previously assessed	Deficiency
1924	$1,399.70	$13.51	$1,386.13
1925	2,092.82	174.44	1,918.38
Total	3,492.52	187.95	3,304.51

In accordance with the decision in the case of Warner v. Walsh (15 Fed. 2d) 367, the amounts paid a widow who elects to accept a testamentary provision for the payment to her of a certain sum annually of trust income in lieu of dower, should be regarded as capital expenditures applied in purchase of her dower right and not as distributions of income to a beneficiary. In other words the particular estate or trust should be held subject to the tax accruing upon the amounts of income turned over to the widow.

Therefore, the amounts paid annually to Julia Butterworth by the estate of Wm. B. Butterworth, as shown by the returns form 1041 filed by you as trustee for 1924 and 1925 are taxable to the estate.

Exhibit B to petition

Be it remembered that I, William B. Butterworth, of Fort Washington, in the State of Pennsylvania, being of sound and disposing mind, memory, and understanding, do make, publish, and ordain my last will and testament in manner following, that is to say:

9 First. I order and direct that all my just debts and funeral expenses shall be fully paid and satisfied by my executors, hereinafter named, as soon after my decease as may be practicable and convenient.

Second. I give and bequeath to my wife, Julia Butterworth, all my jewelry and personal effects of like nature. I also give and

bequeath to her my household furniture, horses, carriages, and automobile, together with all farm implements and articles of like nature now at my home at Fort Washington, in the State of Pennsylvania.

Third. All the rest, residue, and remainder of my estate, real, personal, and mixed, whatsoever and wheresoever, I give, device, and bequeath unto my trustees, hereinafter named, in trust to invest and keep invested in such securities as they, in their discretion, may deem for the best interests of my estate, and to pay over the net income arising therefrom to my said wife, Julia Butterworth, for and during the full term of her natural life. And from and after the decease of my said wife, I order and direct my trustees to pay over one equal fourth share or part of my residuary estate unto my niece, Emma B. Holmes, daughter of my sister, Amanda B. Hellings; and the other three-fourths part of the principal of my residuary estate I order and direct my said trustees to divide equally share and share alike among my nephews and nieces, namely: Harry W. Butterworth, Elizabeth W. Butterworth, Albert W. Butterworth, James Warner Butterworth, Henry W. Butterworth, Annie E. Butterworth, and Lillian P. Kolstead, nee Butterworth.

Fourth. In order that the terms of my said will may be more conveniently carried into effect, I do authorize and empower my said executors and trustees and the survivor of them, as such time or times as they may deem expedient and for the best interests of my estate, by public or private sale or sales, for the best price or prices that can be obtained therefor, at their discretion, to sell and dispose of the whole or any part of the real estate of which I may die seized, and to make, execute, and deliver all deeds, conveyances, assurances, and writings which may be necessary in law to grant and convey a good and proper title therefor to the purchaser or purchasers thereof in fee esimple, free and clear of and from the uses and trusts hereinabove expressed, and limited of and concerning the same, without the purchaser or purchasers thereof being liable for or obliged to see to the proper application of the purchase money.

Fifth. I nominate, constitute, and appoint my wife, Julia Butterworth, my nephew, Henry W. Butterworth, and the Girard Trust Company as executors of this my last will and testament, and trustees for the uses and purposes therein expressed; and I hereby revoke all former wills and testaments by me at any time heretofore made, declaring these presents only to be my last will and testament.

In witness whereof I, the said William B. Butterworth, have hereunto set my hand and seal this eighteenth day of March, A.D. one thousand nine hundred and ten (1910).

WILLIAM B. BUTTERWORTH [SEAL]

Signed, sealed, published, and declared by *by* the within named testator as and for his last will and testament in the presence of

us, who at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELLEN R. KRONEBERGER.
WINFIELD W. CRAWFORD.

11 I, Julia Butterworth, having read the foregoing will of my husband, William B. Butterworth, hereby agree, in consideration of one dollar to me in hand paid by my said husband, the receipt whereof I do hereby acknowledge, and also in consideration of the devices and bequests to me, which are to be in lieu of dower, as set forth in the said will, to waive, release, and relinquish all right or claim whatsoever which I now have or may hereafter acquire to dower out of my said husband's estate, and to accept in lieu thereon the provisions and terms of the said will.

In witness whereof I have hereunto set my hand and seal this eighteenth day of March, A.D. 1910.

JULIA BUTTERWORTH [SEAL]

Signed, sealed, and delivered in the presence of

ELLEN R. KRONEBERGER.
WINFIELD W. CRAWFORD.
per B.

This is a true and correct copy.

GIRARD TRUST COMPANY,
By (name illegible),
Asst. Trust Officer.

12 Before U. S. Board of Tax Appeals

Answer

Filed July 5, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(a) and (b) Admits the allegations contained in paragraphs (a) and (b).

(c) Denies that he erred in determining the tax set forth in said notice of deficiency, and further denies that he erred as alleged in paragraph (c) of the petition.

(d) and (e) Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs (d) and (e) of the petition and therefore denies the same.

(f) Denies the allegations contained in paragraph (f) of petition.

(g) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Sgd.) C. M. CHARRET,
General Counsel, Bureau of Internal Revenue.

Of counsel:
L. A. LUCE,
Special Attorney, Bureau of Internal Revenue.

13 Before U.S. Board of Tax Appeals

Motion by petitioners to amend petition

Filed September 9, 1930.

Come now the petitioners, by their attorneys, and move the Board for leave to amend their petition by filing and attaching thereto the affidavits of Julia Butterworth and Henry W. Butterworth hereto attached.

BARNES, BIDDLE & MYERS,
By CHARLES MYERS,
Attorneys for Petitioners.

Granted September 10, 1930.

(Sgd.) JOHN M. STERNHAGEN,
Member, U.S. Board of Tax Appeals.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Julia Butterworth, being duly sworn according to law, deposes and says that she is one of the trustees under the will of William B. Butterworth, deceased, and one of the petitioners named in the petition filed in this proceeding; that she has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above-mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by her cotrustee; and that the petition filed by deponent's cotrustee, Girard Trust Company, was filed with the consent of this deponent.

JULIA BUTTERWORTH.

Sworn to and subscribed before me this eighth day of September, A.D. 1930.

[SEAL]

DANIEL L. CULLEN,
Notary Public.

My Commission expires March 2, 1933.

14 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Henry W. Butterworth, being duly sworn according to law, deposes and says that he is one of the trustees under the will of William B. Butterworth, deceased, and one of the petitioners named in the petition filed in this proceeding; that he has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above-mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by his cotrustee; and that the petition filed by deponent's cotrustee, Girard Trust Company, was filed with the consent of this deponent.

HENRY W. BUTTERWORTH.

Sworn to and subscribed before me this twenty-eighth day of August, A.D. 1930.

[SEAL] DANIEL L. CULLEN,
Notary Public.

My commission expires March 2, 1933.

15 Before U.S. Board of Tax Appeals

Stipulation re deficiency

Filed January 3, 1931

It is hereby stipulated and agreed by and between the parties to the above-entitled proceeding, through their respective counsel of record, that if the respondent's determination in regard to the isue set forth in the petition herein is sustained, that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60 against these petitioners, as trustees under the will of William B. Butterworth, deceased.

(Sgd.) CHARLES MYERS,
Counsel for Petitioners.
(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

16 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 44368

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST Company, Trustees Under the Will of William B. Butterworth, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decedent's widow elected to take under the will in lieu of dower. In the taxable years the trustees under decedent's will paid over to

the widow the sums to which she was entitled under the will and claimed deductions therefor in computing net income of the testamentary trust. The amounts so paid to the widow, plus the amounts similarly paid to her in previous years, were not equal to the value of the dower interest that she relinquished by electing to take under the will.

Held that the amounts paid to the widow were paid to her in satisfaction of her dower right and not distributions of income within the meaning of section 219 (b) (2) of the Revenue Act of 1924, and hence are not deductible in computing net income of the trust.

Charles Myers, Esq., for the petitioners; Burton E. Eames, Esq., as amicus curiæ; M. E. McDowell, Esq., for the respondent.

Findings of fact and opinion

Promulgated June 23, 1931

17 The respondent determined deficiencies in income tax for the years 1924 and 1925 in the respective amounts of $1,386.13 and $1,918.38. The deficiencies arise out of the disallowance of claimed deductions by the trustees of amounts paid decedent's widow under the will, the widow having elected to take thereunder in lieu of dower. The issue is whether such disallowance was proper.

The parties have stipulated that if the respondent is sustained in his disallowance of the deductions claimed, the correct deficiencies are $319.54 for 1924 and $968.60 for 1925 instead of the amounts determined.

FINDINGS OF FACT

The petitioners herein are executors and trustees of the estate of William B. Butterworth, who died testate on October 5, 1921, while a resident of Pennsylvania. The will, dated March 18, 1910, after disposing of certain personal belongings, provided in part as follows:

"Third: All the rest, residue, and remainder of my estate, real, personal, mixed, whatever and wheresoever, I give, devise, and bequeath unto my trustees hereinafter named, in trust to invest and keep invested . . ., and to pay over the net income arising therefrom to my said wife, Julia Butterworth, for and during the full term of her natural life, ..."

Provision was made for the disposition of the corpus following the death of the deceased's widow. By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Julia Butterworth, the widow, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

18 During 1924 and 1925, the years involved in the proceeding, the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years,

did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts distributed to the widow in the same manner as they deducted amounts similarly distributed to other beneficiaries under the testamentary trust.

OPINION

ARUNDELL: By decedent's will it was provided that his property, after making certain specific bequests, should be placed in trust and the income therefrom paid to the widow. Under the statutes of Pennsylvania a surviving spouse may elect to take either under or against the will. Election to take under the will bars the right of the survivor to dower or any statutory interest in the estate of the decedent. Sec. 8335 et seq. Penna. Stat. 1920; Purdon's Penna. Stat., title 20, §261. In this case the widow elected to take under the will, and during the taxable years the trustees, pursuant to the directions of the will, paid her the income produced by the property held in trust under the will.

The statute here involved is section 219 of the Revenue Act of 1924 which, as far as material here, provides:

"SEC. 219. (a) The tax imposed by . . . this title shall apply to the income of estates or of any kind of property held in trust, including—

"(2) Income which is to be distributed currently by the fiduciary to the beneficiaries . . .;

"(b) Except as otherwise provided . . ., the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

"(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

Under this statute the trustees claim that in computing the net income of the trust they are entitled to deduct the sums paid to the widow as "income . . . distributed currently by the fiduciary to the beneficiaries." The respondent disputes this claim on the ground that, because certain court decisions hold that payments

received by a widow under the circumstances herein are not taxable to her, the payments may not be deducted by the trustees, as it is only income that is taxable to the beneficiary that is deductible.

In Warner v. Walsh, (C.C.A. 2nd Circuit) 15 Fed. (2d) 367, there was a testamentary trust and decedent's widow was to receive an annuity for life out of the income, but if necessary, out of the principal. Those provisions were in lieu of the widow's statutory rights in decedent's estate and were so accepted by her. The question for decision was whether the widow was subject to tax on the annuities received. The court held that the widow was not taxable on the amounts received until they equalled the value of her surrendered dower right saying in part:

20 "What we have here is, in fact and in legal effect, the purchase of an annuity, in no way differing fom an annuity purchasable by the widow from an insurance company, with the proceeds of her statutory rights in the estate, except only that in such a purchase she would have an unsecured obligation, whereas here the obligation is secured by the income and principal of the trust fund. That such a relinquishment of dower rights is a purchase of the will provision is well and long established. Burridge v. Beabyl, 1 Pere Wms. 127 (1710); Isenhart v. Brown, 1 Edw. Ch. (N.Y.) 413 (1832); Requa v. Graham, 187 Ill. 67, 58 N.E. 357, 52 L.R.A. 641 (1900). That a purchased annuity, even if income, is exempt as and to the extent that it is a return of premiums paid therefor; that is, until the purchase price shall have been returned, is determined by the express provisions of the acts above cited, as construed by the Bureau of Internal Revenue."

There was much the same situation in United States v. Bolster (C.C.A. 1st Circuit) 26 Fed. (2d) 760, except that the widow was to receive the income from the testamentary trust instead of a fixed annuity as in Warner v. Walsh, supra. The testamentary provision for the widow in the Bolster case was expressly made in lieu of dower. In that case the court said in part:

"The Federal income tax laws recognize the legal status of the taxpayer as created by local law, and fix the taxes in accordance with such law. By the General Laws of Massachusetts (chapter 191, § 15), as well as under the earlier statutes, a surviving husband or wife may refuse to accept the provisions of a will and take his or her statutory share in the corpus of the estate as if the deceased had died intestate. When the surviving husband or wife accepts the pro- provisions of the will, whether or not such provisions are expressly declared to be 'in lieu of such statutory rights,' the survivor

21 is in the position of one who sells property to the estate, and acquires the legal status of 'a purchaser for a valuable consideration.'

"In Pollard v. Pollard, 1 Allen, 490, 491, speaking for the Supreme Judicial Court of Massachusetts, Chief Justice Bigelow said:

"'The bequest in this case to the widow of the testator is made in express terms in lieu of dower, and on condition that she relinquishes all her right and title thereto.

"'A wife cannot be deprived of her dower except by her own consent. Therefore, when she accepts a provision in her husband's will as a substitute for this existing legal right, the law regards her as standing in the light of a purchaser for a valuable consideration, and entitled to receive the whole of the sum given by the will, for which she has relinquished her life estate in one third of the testator's real estate, in preference to other legatees, who, being only objects of the bounty of the testator, and not having any legal claim on his estate, are regarded as volunteers, and are not allowed to take until the widow has received the full amount of the bequest to her.'

. . . . . .

"Under the principles announced by the Supreme Judicial Court of Massachusetts, we think that, in the case before us, the payments made to Sarah A. Davenport during the years in dispute represented 'purchase money' or 'installment payments' by the estate in consideration for her share in the corpus of the estate. We think, then, that she was a 'purchaser for value.'

. . . . . .

"In the case at bar the local law gave Sarah A. Davenport the status of a 'purchaser for value.' The Federal income tax law recognizes that status. We think it clear that she was not liable for the payment of any of the taxes in dispute; . . .

. . . . . .

22 "While in the Warner case the court had before it an annuity, the provision relating to the annuity was made expressly in lieu of statutory rights of the beneficiary in the estate; we think the principles announced in that case are controlling in the case before us. . . ."

In Allen v. Brandeis (C.C.A. 8th Circuit) 29 Fed. (2d) 363, the testator gave his widow an annual sum of $50,000 for life in lieu of dower, and the widow elected to take under the will and relinquish her dower interest in the estate. Following the Warner and Bolster cases, supra, the court held that the annual sums received by the widow were not taxable until she had recovered the value of her interest in the decedent's estate which she had relinquished by her election. The opinion reads in part:

"It is freely conceded, if the widow had taken the amount of her interest in the estate, and with that sum had purchased an annuity of $50,000.00 per annum for a period of years, such annuities, when paid to her, would not have been taxable to her under the law, for the laws above referred to so provide. In legal effect, is that not precisely what was done in this case? She took her property by her acquired under the laws of the state, turned the same over to her husband's estate under an agreement she should receive as the

purchase price of her interest $50,000.00 per annum from the estate, that is to say, her invested capital was the value of her interest in her husband's estate, to wit, $483,727.79. By the expenditure of this sum, the same being her own money, she purchased an annuity of $50,000.00 per annum from those representing her husband's estate to be paid out of that estate. Clearly, in such case, under the law, she should not be required to pay any income tax on the annual payments received until her capital invested in the annuities shall have been returned to her."

23 After the adjudication of the above cases the respondent published ruling I.T. 2506, C.B. VIII-2, p. 129, holding that in such cases payments made to the widow prior to the time she recovers the value of her dower or statutory interest may not be deducted in computing the net income of the trust, and ruling I.T. 2480, C.B. VIII-2, p. 141, holding that after she has recovered the value of such interest "she is treated as any other income beneficiary" and the executors or trustees will then be permitted to deduct the annual payments in computing net income of the estate or trust. It is the validity of the first of these rulings that is in question here, that is, the treatment of the annual sums by the trustee before the time they equal the value of the right surrendered by the widow. We have no question as to the treatment of such sums by either the trustee or the widow after that time. We make this observation because there may arise a question as to whether such sums will then be technically annuities and not taxable as in Burnet v. Whitehouse, 282 U.S. —, or whether they are bequests of income and taxable as in Irvin v. Gavit, 268 U.S. 161, and Heiner v. Beatty, 17 Fed. (2d) 742, affirmed per curiam 276 U.S. 598.

The idea expressed by the Circuit Courts of Appeals in the above cases that annuities are not taxable until cost has been recovered finds support in the decision of the Supreme Court in Burnet v. Logan, —— U.S. —— (May 18, 1931). In that case the taxpayer in 1916 surrendered shares of stock for cash and the right to receive annually indeterminate future amounts based on the amount of ore removed from a mine. In 1917 the taxpayer inherited from her mother the right to receive similar payments on account of stock surrendered by the mother in 1916. In the years before the court the sums received by the taxpayer—the cash in 1916

24 plus subsequent annual payments—had not equalled the March 1, 1913, value or her surrendered stock, which value was greater than cost. Nor had the sums received by her on account of the stock surrendered by her mother equalled the value of her inherited right to receive future payments. As to the sums received from the surrender of the taxpayer's own stock, the court said:

"The transaction was not a closed one. Respondent [taxpayer] might never recoup her capital investment from payments only conditionally promised Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913.

She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture."

As to the sums received as the result of inheritance, the court said:

"Some valuation—speculative or otherwise—was necessary in order to close the estate. It may never yield as much, it may yield more. If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute definitely excepts bequests from receipts which go to make up taxable income. See Burnet, Commissioner, v. Whitehouse, 282 U.S. —— (April 13, 1931)."

Likewise, the proposition asserted by the Circuit Courts of Appeals, that the widow by acceptance of provisions of the will in lieu becomes a purchaser for value, is amply supported by authority. See cases cited in the Warner, Bolster and Brandeis cases. Such is the law of Pennsylvania. In *Appeal of Kline*, 117 Pa. St. 139; 11 Atl. 866, it is said:

"It is true that her acceptance under the will must be re-
25 garded as an acceptance in lieu of dower, and so to be taken as a purchase for a valuable consideration . . ."

In re Denis' Estate, 169 Pa. St. 493; 32 Atl. 436, holds that—

"She has surrendered her rights under the intestate law in accepting these provisions, and was therefore a purchaser for value of the testamentary provisions in her favor."

In re Taylor's Estate, 175 Pa. St. 60; 34 Atl. 307 holds:

"The widow, by accepting the provisions of the will in lieu of dower, is a purchaser for value . . ."

The above decisions consider the situation from the standpoint of the widow. Considered from the viewpoint of the estate, the holdings are that what occurs in a case of this sort is the purchase by the estate, through the trustee, of the share to which the surviving spouse was entitled. In Requa v. Graham, 187 Ill. 67; 58 N.E. 357, Mrs. Nichols by her will gave her husband an annuity in lieu of the interest in her estate to which he would be entitled. Suit was brought to subject the annuity to payment of a judgment against the husband. The holding of the court was that the husband was a purchaser of the annuity and consequently was not protected by a statute which exempted from creditors' bills trusts created by persons other than the debtor himself. In the course of the opinion the court says:

"The annuity in question was a mere offer by Mrs. Nichols to her husband for the purchase of his interest in her estate."

The opinion quotes from Blatchford v. Newberry, 92 Ill. 11, 62, as follows:

26 "A provision by will in lieu of dower is in fact and in legal effect a mere offer by the testator to purchase out the dower interest for the benefit of his estate."

Isenhart v. Brown, 1 Edw. Ch. 413, is quoted in Carper v. Crowl, 149 Ill. 465; 36 N.E. 1040; and Requa v. Graham, supra, in part as follows:

"It [a devise in lieu of dower] is the price put by the testator himself upon that right, and which she is at liberty to accept, . . . So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to receive is not by way of bounty—like other general bequests; but as purchase money for what she relinquishes."

To the same effect is Green v. Saulsbury, 6 Del. Ch. 371; 33 Atl. 623.

Section 219 of the Revenue Act of 1924, quoted above, deals with income. It taxes trust income primarily to the trustees, but it allows the trustee to deduct the "income . . . which is to be distributed currently by the fiduciary to the beneficiaries." This provision in our opinion relates solely to amounts paid as income to the objects of the testator's bounty. It does not apply to other payments by the trustee, as in this case where the trustee was completing the offer made to the widow for the purchase of her share in the estate; the trustee in such case was merely carrying out the "convention or contract" (Isenhart v. Brown, supra) between the testator and his widow. The widow in such a case is in no sense a beneficiary, but, as held by the authorities above quoted, she is a "purchaser for value." The statute taxes to a beneficiary only "income paid as such" (Burnet v. Whitehouse, 282 U.S.) and in our opinion contemplates the deduction by the trustee only of income paid as such to a pure beneficiary as, for example, in the Gavit and Beatty cases, supra.

27

Petitioners call our attention to the rule that in case of doubt, taxing statutes are to be construed against the Government and in favor of the citizen. In view of the authorities quoted as to the status of the widow who takes a bequest in lieu of dower, we think there is no doubt that the amounts paid to her in this case are not "income . . . distributed . . . to the beneficiaries" and there is no room for application of the rule urged.

It is also argued by the petitioners that the last clause of section 219 (b) (2), which provides that the amounts deducted by the trustees shall be included in the income of the beneficiary, is directed solely to the beneficiary and has no bearing on the preceding part of the section which gives the deduction to the trustee. We have indicated in our discussion so far that our decision is not rested on the last clause of section 219 (b) (2) but is based on the preceding part under which the trustees claim the deduction. But even conceding that there is merit to the claim urged, it does not help the petitioner's case. The point urged is illustrated by supposing the

beneficiary to be dishonest and failing to report income; or, as suggested by amicus curiæ, the beneficiary might be exempt from tax. The examples do not fit the present case because in them it is taken as a premise that there is a beneficiary who has received distributable income, and such is not the case here for reasons above given.

Petitioners also cite Lederer v. Stockton, 260 U.S. 3, in which the Supreme Court held that the trustee of a fund should not be taxed on the income from the fund which had been loaned to
28 an exempt institution pending the time the institution was entitled to it absolutely. During this time the institution enjoyed the income of the fund except a comparatively small part necessary to pay an annuity. The court held:

"As the hospital is admitted to be a corporation, whose income when received is exempted from taxation under § 11 (a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

We think it obvious that that case has no application here. The taxing statute does not purport to put widows in an exempt class and we know of no provision for them which could be construed as evidencing in their behalf any "beneficent purpose of Congress." The Circuit Courts of Appeals cases discussed in the early part of this opinion are not authority for holding that widows constitute an exempt class of persons. Those cases merely put the widow in the same class as other purchasers of annuities, and who receive no taxable income until the cost of the annuities has been recovered.

It is also argued that, if the respondent's position is sustained, the widow gets no real benefit from the decisions holding nontaxable the payments made in lieu of dower. It is not the purpose of courts to construe taxing laws so as to confer benefits other than those prescribed by the statute. If it so happens that certain persons are benefited by one provision of the law, it does not follow that they must receive equal benefits under others. As pointed out above, the courts have not singled out widows and given them an exempt status, but have only in such cases as this, placed them in the same class as other purchasers of annuities.

29 In reaching our decision that the amounts paid to the widow in this case are not deductible by the trustee, we have not overlooked the case of Commissioner v. Moore Corporation, 42 Fed. (2d) 186; affirming 15 B.T.A. 1140. In that case Hattie I. Moore conveyed to the taxpayer certain land and buildings in consideration of the taxpayer's agreement to pay her $10,000 a year for life. It was held that each annual payment of $10,000 consisted in part of principal and in part of interest, and that the amount deductible by the taxpayer as interest was the difference between the $10,000 and its discounted value as of the date of the

conveyance. In this case there is no question as to apportionment, and we have no occasion to inquire into that question.

We also recognize that for some purposes a distinction must be drawn between a bequest of income and a bequest of an annuity. Cf. Whitehouse and Gavit cases, supra. But in the view we take it is not necessary to draw that distinction here. That question may arise after the widow has recovered the value of her dower right (Allen v. Brandeis and Burnet v. Logan, supra), but it is not present in the taxable years.

Reviewed by the Board.

Decision will be entered redetermining the deficiencies in the amounts stipulated.

STERNHAGEN concurs solely by reason of prior court decisions.

30 Before U. S. Board of Tax Appeals.

Decision

Filed June 29, 1931

Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is

Ordered and decided: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60.

(Sgd.) C. ROGERS ARUNDELL,
Member, United States Board of Tax Appeals.

31 In United States Circuit Court of Appeals

Petition of Julia Butterworth, Henry W. Butterworth, and Girard Trust Company, Trustees under the will of William B. Butterworth, Deceased, for review by the Circuit Court of Appeals for the Third Circuit of a decision of the United States Board of Tax Appeals

Filed December 21, 1931

The above-named petitioners, by Charles Myers, their attorney, hereby petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals in the case of Julia Butterworth, Henry W. Butterworth, and Girard Trust Company, Trustees under the Will of William B. Butterworth, Deceased, petitioners, v. Commissioner of Internal Revenue, respondent, docket no. 44368, entered June 29, 1931, finding deficiencies in petitioners' income taxes for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60, and respectfully show:

I. NATURE OF THE CONTROVERSY

The petitioners are executors and trustees under the will of William B. Butterworth, who died testate on October 5, 1921, while a resident of Philadelphia County, Pennsylvania, leaving a last will duly probated before the register of wills of said county, by the terms of which he appointed petitioners as trustees. The will, dated March 18, 1910, after disposing of certain personal belongings, provided in part as follows:

"Third. All the rest, residue, and remainder of my estate, real, personal, mixed, whatever and wheresoever, I give, devise, and
32 bequeath unto my trustees hereinafter named, in trust to invest and keep invested . . ., and to pay over the net income arising therefrom to my said wife, Julia Butterworth, for and during the full term of her natural life, . . ."

Provision was made for the disposition of the corpus following the death of the deceased's widow.

By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Julia Butterworth, the widow, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

During 1924 and 1925, the years involved in the proceeding, the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts distributed to the widow under the testamentary trust.

On March 13, 1929, the Commissioner of Internal Revenue, by J. S. MacLaughlin, collector, mailed to your petitioners a deficiency letter stating therein that the determination of petitioners' tax liability for the years 1924 and 1925 disclosed deficiencies in the respective amounts of $1,386.13 and $1,918.38 in income taxes for said years.

Within sixty days from the date of said deficiency letter, to wit, on May 11, 1929, your petitioners filed their petition with the United States Board of Tax Appeals, appealing from the aforesaid determination of the Commissioner of Internal Revenue.

33 After hearing before the United States Board of Tax Appeals on November 11, 1930, the said Board on June 23, 1931, promulgated its findings of fact and opinion, in which it held that under section 219 of the Revenue Act of 1924, the petitioners, in computing the net income of the decedent's estate subject to income tax for the calendar years 1924 and 1925, were not entitled to deduct the amounts distributed to the decedent's widow, and on June 29,

1931, the Board, pursuant to said findings of fact and opinion, ordered and decided that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60, the parties having stipulated that if the respondent should be sustained in his disallowance of the deductions claimed, the correct deficiencies are in the amounts stated.

II. COURT IN WHICH REVIEW IS SOUGHT

Petitioners aver that their income tax returns for the calendar years 1924 and 1925 were filed in the office of the collector of internal revenue for the first district of Pennsylvania, at Philadelphia, Pennsylvania, which collector's office is located within the third circuit, and this appeal is therefore taken to the United States Circuit Court of Appeals for the Third Circuit pursuant to section 1002 of the Revenue Act of 1926.

III. ASSIGNMENTS OF ERROR

(1) The United States Board of Tax Appeals erred in refusing to allow as a deduction in computing the net taxable income of the trustees under the will of William B. Butterworth, deceased, for the calendar years 1924 and 1925, the amount of the income of the trust that was distributed to the decedent's widow during said years.

34 (2) The United States Board of Tax Appeals erred in holding that the widow of William B. Butterworth, to whom was given by his will the income from his residuary estate for life, is not a "beneficiary" of his estate.

(3) The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue, as follows:

"Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is ordered and decided: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60."

CHARLES MYERS,
Attorney for Petitioners,
1421 Chestnut Street, Philadelphia, Pa.

[Duly sworn to by Charles Myers; jurat omitted in printing.]

35 Before U.S. Board of Tax Appeals

Statement of evidence to be included in the record sur petitioners' appeal to the United States Circuit Court of Appeals for the Third Circuit

Filed February 25, 1932

To the Clerk of the United States Board of Tax Appeals:

The evidence to be included in the record sur petitioners' appeal to the United States Circuit Court of Appeals for the Third Circuit

shall consist of the findings of fact contained in the opinion of the Board and the copy of the decedent's will attached to the petition for redetermination, which was received in evidence at the hearing on November 11, 1930.

CHARLES MYERS,
Attorney for petitioners.
1421 Chestnut Street, Philadelphia, Pa.

Approved.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Approved.
C. R. ARUNDELL,
Member, United States Board of Tax Appeals.

FEBRUARY 29, 1932.

36 Before U.S. Board of Tax Appeals

Praecipe for record

Filed March 5, 1932

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and on or before March 19, 1932, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the Third Circuit, a transcript of the record in the above cause, prepared and transmitted as required by law and the rules of said court, and to include in said transcript of record copies of the following documents duly certified as correct:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination, including exhibits attached thereto.

(b) Answer of the respondent.

(c) Motion of petitioners to amend petition granted September 20, 1930.

(d) Stipulation setting forth the amount of deficiencies if the respondent's determination is sustained.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

37 (5) The petition for review filed by the petitioners in the above cause.

(6) Statement of the evidence to be included in the record sur petitioners' appeal to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) CHARLES MYERS,
Attorney for Petitioners.
1421 Chestnut Street, Philadelphia, Pa.

Service of a copy of the foregoing praecipe for the record accepted this day of March, 1932.

Attorney for Respondent.

38 [Clerk's certificate to foregoing transcript omitted in printing.]

39 [Minute entry of argument and submission, Oct. 6, 1932, omitted in printing.]

40 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4902

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST Company, Trustees Under the Will of William B. Butterworth, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review from the United States Board of Tax Appeals

Opinion

Filed March 3, 1933

Before WOOLLEY, DAVIS, AND THOMPSON, Circuit Judges

WOOLLEY, Circuit Judge: William B. Butterworth, a resident of Pennsylvania, died in 1921. By his will he bequeathed certain property to his wife absolutely and gave the residue of his estate to the petitioners, as trustees, to pay "the net income arising therefrom" unto his wife for life, with remainders over. His wife elected to take under the will in lieu of the interest in her husband's
41 estate which the law of Pennsylvania gave her. For several years the trustees paid her amounts which, in the aggregate, did not exceed the value of the interest in the estate to which, but for her election, she would have been entitled under the law. In filing income-tax returns for the years 1924 and 1925, the trustees, when "computing the net income of the estate or trust", deducted from gross income the part which they had distributed to the widow during those years, pursuant to terms of the applicable revenue acts as there stated and then understood. The Commissioner of Internal Revenue disallowed the deductions and, accordingly, assessed deficiency taxes against the trustees, whereupon they appealed to the

United States Board of Tax Appeals. The Board sustained the Commissioner. The trustees are here by petition asking this court to review and annul the Board's action.

The controversy before the tax tribunals and now before this court is the result of decisions by the Circuit Courts of Appeals for the First, Second, and Eighth Circuits in Warner v. Walsh, 15 Fed. (2d) 367; United States v. Bolster, 26 Fed. (2d) 760; and Allen v. Brandeis, 29 Fed. (2d) 363, wherein those courts held, in one form or another, that when a widow relinquishes her statutory rights in her husband's estate by electing to take in lieu thereof provisions made for her in his will, she takes as purchaser for a valuable consideration as though she had bought an annuity (People, ex rel. Kight v. Lynch, 255 N.Y. 323, contra), and money from the trust, earned as income, afterwards received by her under the will constitutes a return of her capital and therefore is not taxable, Eisner v. Macomber, 252 U.S. 189, until the payments she has received shall have equalled the value of her surrendered statutory rights. The Commissioner of Internal Revenue, realizing the effect of these decisions on taxation, revised the practice of the department
42 by rule I.T. 2506. In an effort to close the breach thus made in the collection of taxes, the Board of Tax Appeals, going a step beyond the decisions and deciding a question—the right of a fiduciary in computing net income of a trust to deduct the amount distributed to the widow—with which those courts were not confronted, sustained the Commissioner, holding that the widow, in case of election, became a purchaser, not in the sense in which the law distinguishes a taking by purchase from a taking by inheritance but a purchase by contract; that she purchased with her capital (her surrendered statutory rights) and what she received from the trust was capital returned; that, being a purchaser, she was not a beneficiary under the trust, that is, not a "pure beneficiary"; and that, in consequence, the fiduciary could not deduct for the distribution to her under the statutes which allowed a deduction only of distributions to "beneficiaries."

The practical effect of the Board's decision, if it stands, is to impose an unexpected tax burden upon the trust or upon other beneficiaries and, oddly enough, upon the widow herself. If it does not stand, the government will lose taxes; those which are not paid by the widow under the decisions and those which, because of deduction of income distributed, are not paid by the trust. The legal effect of the Board's decision on this case is reflected in the three questions of law submitted:

(1) Whether or not payments made by trustees to the widow under a will in case of her election represent a return of capital?

(2) If capital, is it deductible by the fiduciary in computing net income of the trust?

(3) Though under the decisions the widow is, on election,
43 a purchaser of the provisions made for her benefit in her husband's will is she still a "beneficiary" within the terms

of the revenue acts which permit a fiduciary "in computing net income of the estate or trust" to deduct the amount of income it has "distributed currently . . . to the beneficiaries"?

To these submitted questions we add one of our own: Whether the cited decisions, which, as we read them, extend and are limited to a finding that income of a trust in the hands of a widow after election is not taxable, affect the meaning of the revenue acts, which the Congress had previously passed in respect to deductions allowed the fiduciary in distributing income to beneficiaries?

The pertinent provisions of the revenue acts, section 219 a (2), b (2) (43 Stat. 253; 44 Stat. 9), whether of 1924 or 1926 which were identical in number and terms, and are now superseded by other acts, clearly provided several things in regard to the imposition and computation of taxes on trust estates: (1) That the tax shall be upon income; (2) that it be upon income either accumulated in trust for future purposes or upon income which has been or is to be distributed currently by the fiduciary to beneficiaries; (3) that it be computed upon net income of the trust; (4) that it be computed in the manner provided in section 212; (5) that, as an exception to the last provision, in computing net income for a taxable year there shall be allowed the fiduciary, as an additional deduction, "the amount of income of the . . . trust . . . which is to be distributed currently by the fiduciary to the beneficiaries"; and (6) that the "amount so allowed (the fiduciary) as a deduction shall be included by the beneficiaries in computing their taxable net income whether distributed or not."

In a word, the statutes intended that the trustees shall show in their returns distribution of income to beneficiaries; that they
44 may then deduct the same; and thereafter the beneficiaries shall pay the taxes on the amounts which they severally have received.

It should be noted that the first question submitted to us—whether payments to the widow, after election, of income from a trust constitutes a return of capital and therefore is not taxable—is the same question submitted to and decided by the three Circuit Courts of Appeals. An altogether different question before this court—one to which the widow, now exempt, is not a party—is whether the fiduciaries of the trust in returning income may deduct what they had distributed to the widow as a beneficiary and thus avoid taxes against themselves for that amount? As the first question is not before this court, we shall, of course, not pass upon it. The second submitted question is stated as a corollary of the first. We shall not discuss it— except casually in connection with another phase of the case. We shall, however, assume without deciding that the way in which the Circuit Courts of Appeals decided the question before them was right. We shall also assume that those courts, not having before them the question which is before this court, did not rule on that question. It follows that the three cited decisions do not rule this case either on facts or in law and are present only be-

cause of the trouble they have made in the collection of taxes and are pertinent only as the trend of their reasoning may, logically, influence an interpretation of the provision of the revenue acts in respect to deductions by fiduciaries in making the tax returns now under review.

On accepting for purposes of discussion the reasoning of the Circuit Courts of Appeals to the effect that a widow, on election, becomes a purchaser for a valuable consideration and income afterwards received by her from the trust is capital returned, the word "capital"—the critical word in exempting the widow from
45 taxation—is the only impediment to a literal interpretation of the plain words of the acts which allowed a deduction in such case. In connection with the phrase "capital returned" there is an intimation in the cases and a finding by the Board of Tax Appeals that the widow is a purchaser by reason of contract. All this may be sound law appropriately applied to the question before the Circuit Courts of Appeals. There we shall let it stand. But when the law of those cases is transposed into the altogether different question in this case, it encounters, we think, certain legally impassable barriers.

Turning to the statutes and looking upon their provisions with respect to taxation of trusts, they deal with income not of widows but of trusts and with distribution and computation of income by trustees for tax purposes. Indubitably, the thing the trustees here received from the estate was income. With equal certainty the thing they distributed to the widow was the same income they had received. They were without power to distribute anything else. No alteration in her status from a named beneficiary to a purchaser can change that fact. Income remains income regardless of a question whether it is taxable in a particular case. Moreover, what the widow elected to take under the will was income. That was the only thing the settler provided for her. Failing income earned, she would take nothing. The government does not go so far as to contend that, income failing, the trustees could return her capital by extracting it from the principal of the trust. Further, however, the words "purchaser" and "capital" should be used, it is manifest the widow was not a purchaser by contract. As widow she had two rights in respect to her husband's property: on which the state law gave her; the other which the will gave her. She might assert one or the other. This involved her election. Without making a
contract with the trustees, who, of course, were powerless to
46 make a contract disposing of their decedent's property, and wholly apart from the idea of mutual consent, the essence of a contract, she could, without anybody's consent, on her own election take under the law or under the will. If she takes by purchase in the sense of the law of acquisition as distinguished from the law of inheritance, she then takes under the will and is entitled to receive what the will provides for her. Whatever it may be in her hands for purposes of taxation, it is at all times income in the hands of

the trustees. That being so, the trustees must account for that income to the Government for purposes of taxation. This they did by making returns which conformed literally with existing law, yet showed no tax liability on their part. The Government says, in effect, in such case someone must pay the tax; now that the widow is free, the trustees (by disallowing the deduction) must pay, even if the tax is to be paid out of income payable to other beneficiaries and otherwise payable to the widow herself, or at the expense of remaindermen. The infirmity in this argument is that taxation is not imposed by reasoning or by an exigency but by statute and only those named in the statute must pay a tax. If in naming taxables it should, as here, later be found that the Congress (for whatever reason) omitted a class available for taxation, that is a misfortune of the Government which cannot be cured by a court reading into a statute something which is not there, or giving its words a meaning different from their known and ordinary signification, Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560; Heiner v. Beatty, 17 Fed. (2d) 743; 276 U.S. 598; Woolford Realty Co. v. Rose, 52 Pa. Sup. Ct. 568; and different from the way they were understood by tax officials and taxpayers and by them acted upon until the decisions by the Circuit Court of Appeals. Assuming that these decisions declared what had been the law all along, and assuming
47 also that, before the decisions, the Congress knew the law, it is pertinent to note that, in enacting the statutes, it made no exception in the generality of the provision taxing beneficiaries on income distributed under a trust, and no recognition that a changed status of a person named in the will from beneficiary to purchaser altered or changed the allowance of the deduction by the fiduciary of income so distributed. It said the fiduciary may deduct; not that he may deduct if or provided the income so deducted is taxable to the recipient. It distinctly did not say that he may not deduct if the income is not taxable to the recipient. In other words, the right of deduction which the Congress gave a trustee was not conditioned upon the taxability of the beneficiaries. The grant, by its terms, was absolute. Or, we may assume for purposes of discussion, and with entire respect, that the Congress did not know the law of the three cited cases until the Circuit Court of Appeals declared it. In that event the Congress made no provision for such a situation. It follows that in either case, knowing the law or not knowing the law, the Congress declared the way in which income from a trust estate should be computed and gave, without excepting the situation in this case and without any like limitation, a right to a fiduciary to deduct distributed income from gross income in making income-tax returns, and provided, accordingly, who should pay the tax. As that right was conferred upon a trustee by words of the statute which, standing apart from the three cited decisions, are so plain as not to admit of construction, we hesitate to withdraw the right by giving the words of the Congress a meaning different from what its words import merely because the Government will, unless this is done, lose revenue from a source of which it has not availed itself.

Construed literally and as not affected by the cited decisions
48 of the Circuit Court of Appeals, the provisions of the acts which allow a fiduciary a deduction for "income" "distributed . . . to beneficiaries", there remains the question whether the widow (a purchaser under the cases) is a beneficiary under the will? Unless the word "purchaser" has a legal meaning that excludes all other possible relations to the trust, we can conceive that, though acquiring her interest by purchase, she holds as a beneficiary. There is, undoubtedy, a trust. The trust provides benefits for several persons, among them the widow, should she choose to accept them. She chose. The method of her choosing (by purchase, we shall say) did not alter the status she attained by the choice. She receives benefits from the trust and, receiving benefits, she is a beneficiary and is none the less so because she may have given a valuable consideration in acquiring that status.

Section 219 of the revenue act deals generally with beneficiaries, not only in subdivision b (2), the one directly in question, but in subdivisions g and h. Of the word thus generally used, the Treasury Department, by regulation 65, article 347, announced its own definition:

"The term 'beneficiary' as used in this article includes any person entitled to an interest in the income or the principal of a trust, . . ."

It is admitted that the widow had an interest in the trust. It is to be assumed that the Congress in framing the section used the word "beneficiary" in the same sense in all cases. Pampanga Mills v. Trinidad, 279 U.S. 211, 218.

As the widow, admittedly, has an interest in the trust, it must be an equitable interest. Her rights are those of a beneficiary measured by the trust provisions in the will made for her benefit. They speak in terms of income. She has an equitable life estate in the trust and a right to its income for life. That she elected
49 the will instead of statutory rights cannot change the nature of the estate given to her by the will, or change her position as a cestui que trust. She is the object of the testator's bounty, involving benefits greater (she must have thought) than her statutory interest in her husband's estate, else she would not have elected to take them. Having so elected, she has taken the benefits the will provides, which is another way of saying she is a beneficiary under the will. Gruver v. Wood, 174 Mass. 540.

The judgment of the Board of Tax Appeals is reversed.

THOMPSON, Circuit Judge, dissenting.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

50 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4902

JULIA BUTTERWORTH ET AL., TRUSTEES UNDER WILL WILLIAM B. Butterworth, Deceased, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed March 3, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was aruged by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

Philadelphia, March 3, 1933.

VICTOR B. WOOLLEY, *Circuit Judge.*

[File indorsement omitted.]

51 [Clerk's certificate to foregoing transcript omitted in printing.]

52 Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petitioner herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File no. 37673. U.S. Circuit court of Appeals, Third Circuit. Term no. 75. David Burnet, Commissioner of Internal Revenue, Petitioner, vs. Julia Butterworth, Henry W. Butterworth, and Girard Trust Company, Trustees Under the Will of William B. Butterworth, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed May 17, 1933. No. 75, O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE, 1933